UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86—September Term, 1974.

(Argued November 8, 1974 Decided January 3, 1975.)

Docket No. 74-1447

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Plaintiffs-Appellants,

—against—

LEONARD H. CHAPMAN, as Commissioner of the Immigration and Naturalization Service and SOL MARKS, as New York District Director of the United States Immigration and Naturalization Service,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
ANDERSON and MULLIGAN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Lee P. Gagliardi, *Judge,* denying plaintiffs' motion for a preliminary injunction restraining the defendants from implementing a challenged policy and deporting plaintiffs.

Affirmed.

LEON FRIEDMAN, New York, New York (American Civil Liberties Union Foundation, New York, New York, Melvin L. Wulf; Pollack & Kramer, Brooklyn, New York; Fried, Fragomen & Del Ray, New York, New York, Austin T. Fragomen, Jr., Martin L. Rothstein, of Counsel), *for Plaintiffs-Appellants.*

LYDIA E. MORGAN, Special Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Mary P. Maguire, Special Assistant United States Attorney, of Counsel), *for Defendants-Appellees.*

MULLIGAN, *Circuit Judge:*

This is an appeal from an order of Hon. Lee P. Gagliardi, United States District Judge for the Southern District of New York, entered on February 8, 1974, denying the motion of the appellants for a preliminary injunction in accordance with his opinion of February 6, 1974. We affirm.

I

Rodolphe Noel is an alien and a native and citizen of Haiti. He was admitted to this country on May 24, 1969 as a non-immigrant visitor for pleasure. This status permitted him to stay here for two months. He did not make a timely departure but remained here illegally until he was apprehended by agents of the Immigration and Naturalization Service (INS) on June 15, 1972. Deportation proceedings were thereupon promptly commenced. At a hearing on June 27, 1972, Noel admitted that he was deportable and represented that he was willing and able to leave the country at his own expense. He was given

until September 27, 1972 to depart voluntarily. He again failed to leave and a warrant of deportation issued on July 12, 1973. Noel was advised by letter to report on August 21, 1973 for deportation. Instead of reporting, Noel requested an extension of his time to depart for an indefinite period because, on April 13, 1973, he had married Emiris Noel, a lawful permanent resident of the United States. This marriage, he urged, had exempted him from the requirement of obtaining a labor certification before applying for an immigration visa. 8 U.S.C. § 1182(a)(14). If an indefinite extension of voluntary departure were granted, Noel would, in effect, be allowed to remain in this country an additional period of as much as two years until a visa became available. The request was denied but deportation was stayed for seven days to permit the institution of court action.

Antoine Petit's position is like unto Noel's. He is an alien and a native and citizen of Haiti who was admitted here on August 4, 1970 as a visitor for pleasure for a two-month stay. He did not leave but rather obtained employment in violation of his non-immigrant status. *Londono* v. *INS*, 433 F.2d 635 (2d Cir. 1970) (*per curiam*). He was apprehended on June 7, 1973. Deportation proceedings were promptly commenced, and, at his hearing on June 8, 1973, Petit admitted that he was deportable and requested that he be permitted to depart voluntarily. He was extended the privilege of voluntary departure until July 8th, 1973. Instead of departing, Petit married Yanick Petit on June 26, 1973. His bride had entered the United States a week before as a permanent resident immigrant. Petit also applied for an extension of voluntary departure until a visa became available. The District Director, by letter dated July 18th, 1973, denied the request and ordered his departure by July 27th, 1973. Petit did not leave and, on August

6, 1973, a warrant of deportation was issued, ordering his departure for Haiti on September 5, 1973.

On August 24, 1973, Noel and Petit and their brides commenced this action in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the policy of the INS as to extensions of voluntary departure for the relatives of resident aliens was unconstitutional, and further seeking a preliminary injunction enjoining the INS from deporting Noel and Petit. While initially commenced as a class action, the class claim has since been abandoned. Although technically the appeal here is from an order denying a preliminary injunction, the opinion of the court below finally determined the underlying legal and constitutional issues so that the case is ripe for plenary appellate review. Sound judicial administration requires us to avoid subsequent unnecessary proceedings in the district court. See *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1311 (D.C. Cir. 1968); *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir.), cert. denied, 385 U.S. 971 (1966); 9 J. Moore, Federal Practice ¶ 110.25[1] (2d ed. 1973).

II

It is undisputed that aliens who are the parents, children of spouses of an American citizen may enter the country without numerical limitation and need not obtain labor certification, regardless of where they are from. 8 U.S.C. §§ 1151(b) & 1182(a)(14). Aliens who are the parents, children or spouse of a resident alien and who are not from the Western Hemisphere are also exempt from the labor certificate requirement, id. § 1182(a)(14), and receive a special right of preference over others seeking a visa within the relevant quota limit of 170,000, id. § 1153(a). However if the aliens are from the Western Hemisphere and

are parents, children or spouses of a resident alien, they are exempt from the labor certificate requirement, id. § 1182(a)(14), but they receive no preference rights, i.e., they, along with all other Western Hemisphere aliens, may obtain visas subject to the 120,000 numerical quota, Act of Oct. 3, 1965, Pub. L. No. 89-236, §21(e), 79 Stat. 921. These differences in treatment between aliens' and citizens' relatives and between Eastern Hemisphere and Western Hemisphere alien relatives of resident aliens were specifically provided for by the 1965 major congressional amendments to the Immigration and Nationality Act which abolished the national origins quota system. Act of Oct. 3, 1965, *supra.*[1]

Since at least 1952, the law has provided that the privilege of voluntary departure may be granted to a deportable alien at the discretion of the Attorney General. Immigration and Nationality Act of 1952, ch. 5, § 244, 66 Stat. 214, presently codified at 8 U.S.C. § 1254. By regulation, the authority to extend the time within which to voluntarily depart is within the sole discretion of the District Director of the INS. 8 C.F.R. § 244.2. INS policy between 1968 and June 1972 in the New York District had been more liberal than that elsewhere in the nation. Western Hemisphere aliens, such as Noel and Petit, who were in this country and married to permanent resident aliens had been routinely granted extended voluntary departure until an immigrant visa became available. However, on June 27, 1972, Congressman Rodino, Chairman of the House Judiciary Committee, advised the Commissioner of INS that hearings of his Subcommittee on Immigration and Na-

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1 Prior to 1965, immigration from the Western Hemisphere was not numerically controlled. The prior non-quota status of such aliens was abolished by the 1965 amendments and the special annual quota of 120,000 was established, separate from the annual 170,000 worldwide quota.

tionality had indicated that the employment of illegal aliens in this country was unfavorably influencing the domestic job market and that routinely permitting them to remain in the United States to await visas was no longer justifiable. The Service informed all its District Directors that, as of July 31st, 1972, Western Hemisphere aliens should not routinely be granted extended departure time, but rather should be offered that privilege only in those cases where compelling circumstances warranted the relief. On April 10, 1973, the policy was liberalized to provide that the earlier New York policy granting extended departure would be applied to those aliens who were present in the United States and who had the requisite family status on or before April 10, 1973. Neither Noel nor Petit was married on April 10, 1973, and hence each is subject to deportation, which has been voluntarily extended by the Service until this litigation is terminated.

Had Noel and Petit married American citizens they would not have been subject to numerical immigration limits. 8 U.S.C. § 1151(b). The INS policy with respect to such aliens is to allow them the privilege of an extension of voluntary departure until they obtain visas, which involves a significantly shorter wait than in the case of an alien married to a resident alien who is subject to numerical limitations. Appellants contend that the INS policy is illegal. They claim (a) that there is nothing in the 1965 amendments to the law which requires the INS to distinguish between immediate family members of resident aliens, on the one hand, or of citizens, on the other, for the purpose of setting voluntary departure dates; (b) that the policy of the INS violates the equal protection concepts inherent in the due process clause of the fifth amendment,[2] and con-

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2 If a classification would violate the equal protection clause of the fourteenth amendment, then it would also be invalid under the due process clause of the fifth amendment. *Johnson* v. *Robison*, 415 U.S.

stitutes an abuse of administrative discretion; and (c) that the policy was issued in violation of the Administrative Procedure Act, 5 U.S.C. § 553. They seek to have the policy voided and to receive the benefits of the old policy under which they may await visas here along with the immediate relatives of American citizens.

III

The attack upon the constitutionality of the policy of the Service is bottomed upon the contention that alienage is a suspect classification, that, since the policy provides for disparate treatment of the alien spouses of citizens and resident aliens, and, furthermore, since the classification impinges upon the fundamental right of the family to remain intact, the policy must be subject to strict scrutiny. *Graham* v. *Richardson,* 403 U.S. 365 (1971).

The cases relied upon by appellants are not controlling here. In *Graham* v. *Richardson, supra,* the Court found unconstitutional two state programs which denied welfare benefits to non-citizens or granted them only to aliens who had resided in the United States for a specified time. In *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), the Court found that a New York statute violated equal protection rights since it provided that only citizens would be eligible for civil service appointments. In *In re Griffiths,* 413 U.S. 717 (1973), the Court on a similar basis invalidated a citizenship requirement for admission to the Connecticut bar examination. These cases involved action by states which discriminated with respect to the rights and privileges which persons living in this country possess. None involved the power of INS to administer the immigration laws of

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361, 364 n.4 (1974); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). The fourteenth amendment applies to the states but not to the federal government, which is restricted only by the fifth amendment.

the United States, which by their very nature involve the question of alienage.[3]

The Supreme Court has consistently held that Congress has plenary power in the area of immigration. Thus in *Galvan* v. *Press*, 347 U.S. 522 (1954), Mr. Justice Frankfurter wrote:

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Govern-

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3 In an effort to escape the argument that *Graham*, *Sugarman* and *Griffiths* involved actions by *states* infringing the rights of aliens, appellants also cite several cases in which *Federal* restrictions upon the rights of aliens have been struck down. *Mow Sun Wong* v. *Hampton*, 500 F.2d 1031 (9th Cir. 1974), cert. granted, 42 U.S.L.W. 3678 (June 10, 1974); *Ramos* v. *United States Civil Service Comm'n*, 376 F. Supp. 361 (D.P.R. 1974) (three-judge court); *Diaz* v. *Weinberger*, 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court). Briefly stated, these cases hold that exclusion of aliens from federal civil service employment and imposition of a durational residency requirement as a condition for eligibility for Medicare are unconstitutional. With the Supreme Court cases discussed above, these cases do not go further than to declare that the federal and state governments cannot treat aliens legally residing in this country differently from citizens with regard to certain rights or privileges. The Supreme Court has stated the essential significance of these cases as follows:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.

Takahashi v. *Fish & Game Comm'n*, 334 U.S. 410, 420 (1948), relied upon in *Graham* v. *Richardson*, *supra*, 403 U.S. at 374.

These authorities are inapposite in the context of the enforcement of the immigration laws against aliens who, rather than living lawfully in this country, are by their own admission deportable. An examination of some of the cases cited by appellants themselves reveals a recognition by the courts of the relevancy of the fact of alienage in certain situations and the breadth of executive power over enforcement of the immigration laws. *Sugarman* v. *Dougall*, 413 U.S. at 646-49; *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-67 (1972); *Graham* v. *Richardson*, 403 U.S. at 376-80; *Ramos* v. *United States Civil Service Comm'n*, 376 F. Supp. at 366 n.8.

> ment must respect the procedural safeguards of due process . . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.

347 U.S. at 531 (citations omitted).

Recently, in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), the Court reaffirmed the plenary power of Congress, quoting with approval the opinion of the first Mr. Justice Harlan in *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895):

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

There can be no doubt but that Noel and Petit as unadmitted and non-resident aliens have no constitutional right to enter and to remain in this country. See *Galvan* v. *Press*, *supra*, 347 U.S. at 530-32. It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles. The cases relied upon by appellants to support the contrary contention, *Loving* v. *Virginia*, 388 U.S. 1 (1967) and *Stanley* v. *Illinois*, 405 U.S. 645 (1972), involved interferences by states and not INS, and thus cannot control decision in an area in which, as we have noted, the Government has broad powers. Other precedents suggest the error of appellants' position. In *Zemel* v. *Rusk*, 381 U.S. 1 (1965), the Court upheld the

right of the Government to refuse to validate an American passport for travel to Cuba despite the claim that there was an interference with the constitutional right of the citizen to travel. In *Kleindienst* v. *Mandel, supra,* the Court upheld the refusal of the Attorney General, through INS, to waive visa requirements of an alien scholar despite the claim of American intellectuals that their first amendment rights to hear, speak with and debate the foreign professor were violated. More directly in point is *Silverman* v. *Rogers,* 437 F.2d 102 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971), in which the court refused to enjoin the deportation of an alien who was married to an American citizen despite the claim that the action was unconstitutional since it destroyed the constitutional rights of the parties to live together in marriage. The same argument was rejected in *Swartz* v. *Rogers,* 254 F.2d 338 (D.C. Cir.), cert. denied, 357 U.S. 928 (1958). Judge Prettyman commented succinctly:

> Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created. The physical conditions of the marriage may change, but the marriage continues. Under these circumstances we think the wife has no constitutional right which is violated by the deportation of her husband.

254 F.2d at 339.

In view of the plenary power vested in Congress to fix and in the executive to enforce, the terms and conditions of entry and stay in the United States, alienage cannot be a suspect classification in this context, nor is there an interference with any fundamental rights to marry and to raise

a family. This being so, it follows that the strict or compelling interest test espoused by appellants cannot be applied in ths case.

The Government has argued that the appropriate standard of review of the INS policy before us is the flexible approach taken by this court in *Boraas* v. *Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973). It had been suggested that Supreme Court doctrine in the equal protection area had evolved from a two-tiered standard to a less rigid formula which allowed for consideration of factors otherwise largely ignored. Gunther, The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). Although the precise contours of an appropriate intermediate test remained somewhat unclear, Comment, Equal Protection in Transition: An Analysis and a Proposal, 41 Fordham L. Rev. 605 (1973), this court applied that test in *Boraas*. However, the Supreme Court refused to apply an intermediate test in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), despite the strong urging of a dissent, 411 U.S. at 98-110 (Marshall, *J.*, dissenting), citing, *inter alia*, Gunther, *supra*. More recently, the Supreme Court reversed the decision of this court in *Boraas* and decided the issue of certain zoning restrictions on the basis of the traditional limited scrutiny standard. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). It is thus unclear whether or not the Court accepts the intermediate test which courts and scholars had perceived in some of its recent decisions. *Citizens Committee for Faraday Wood* v. *Lindsay*, *slip op.* 585, 589 n.5 (2d Cir. Dec. 5, 1974). However, even if the intermediate test retains some vitality, we conclude, in light of the extensive power over immigration possessed by the INS, that the

limited scrutiny test should be applied here, as it was in *Rodriguez* and *Boraas, supra.*

There is a rational relationship which supports the policy of INS under attack here. The 1965 amendments reflect the purpose of Congress "to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market . . . ." S. Rep. No. 748, 89th Cong., 1st Sess., 1965 U.S. Code, Cong. & Admin. News. 3329. It was the Congress which made the distinction between immediate relatives of American citizens and permanent resident aliens and which entrusted the Attorney General with jurisdiction to grant extended voluntary departures to Western Hemisphere aliens. Although this policy was exercised liberally in the New York District, by 1972 a long waiting list of such aliens developed and the wait for an immigrant visa approached the period of two years.[4] Western Hemisphere aliens were coming to the United States in large numbers and remaining illegally in the expectation of a marriage which would assure their continuing residence here. In view of domestic employment problems which continue to affect American workers, the policy of INS to discourage the practice is understandable and certainly bears a rational and substantial relationship to the avowed purpose of Congress to protect the American economy. *Wong Wing Hang* v. *INS,* 360 F.2d 715, 718-19 (2d Cir. 1966). The fact that greater liberality is accorded to the spouses of American citizens is, in our view, a matter of the discretion of INS which, as we have pointed out, is plenary in this area.

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4 The appellants admit in their brief that "[u]nder present conditions, after the filing of a Western Hemisphere visa application and the contemporaneous assignment of a priority date for visa assignment, the subsequent wait for visa assignment can be as long as 22 months or more."

Certainly there is no abuse of discretion in the cases before us. Both Noel and Petit had been initially granted the privilege of voluntary departure pursuant to their request, but had then abused it. Under these circumstances, there is no reason for judicial interference. See *Bowes* v. *INS*, 443 F.2d 30 (9th Cir. 1971) (*per curiam*); *United States ex rel. Lee Pao Fen* v. *Esperdy*, 423 F.2d 6, 8-9 (2d Cir. 1970). In fact, granting the relief sought would place Noel and Petit in a position of precedence over those Western Hemisphere aliens who have made applications for visas in regular course and who are awaiting their turn for admission. There is no reason to prefer those who have flouted the immigration laws, which permitted their entry for a limited time and purpose, over those who have steadfastly and patiently followed legal procedures.

IV

The appellants here finally contend that the INS policy is invalid since it violates the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Section 553(b) & (c) requires that an agency which proposes to issue a rule must publish a notice in the Federal Register indicating the time, place and nature of the public rulemaking procedure, and give interested parties an opportunity to participate in the rulemaking by submission of data. It is admitted that no such notice was provided here. Nor is there any contention made that the appellants had any actual notice of the INS policy change which would excuse publication in the Federal Register. See *United States* v. *Aarons*, 310 F.2d 341, 348 (2d Cir. 1962).

Although the Act does exempt from judicial review agency action which is committed to agency discretion by law, 5 U.S.C. § 701(a)(2), it seems settled that we do have jurisdiction to review exercises of INS discretion to de-

termine whether they are arbitrary or capricious. See *Foti* v. *INS*, 375 U.S. 217, 228-30 (1963); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957). On this basis we have already determined that there was no such abuse here. Although no authority precisely in point has been found, it would seem clear that we also have jurisdiction to determine whether or not INS followed the Act's rulemaking procedures. INS argues that the appellants have no standing to attack the procedure since none of them was married at the time the change in policy was made. Mrs. Petit was not even in the country on August 1, 1972 or on April 10, 1973, when the policy was made and modified respectively; her husband was not apprehended until June, 1973; and both Noel and Petit had represented prior to their marriages that they would leave voluntarily. The status or whereabouts of Mrs. Noel does not appear in the record; we know only that she did marry her husband on June 27, 1973, which was after the dates in question. We need not, however, reach the question of standing here since section 553(b)(A) exempts "general statements of policy" from the notice requirements of section 553(b). The court below found that the August 1, 1972 policy and the April 10, 1973 modification are within the statutory exception for general statements of policy. While the distinction between a rule as defined in section 551(4), which must be published, and a "general statement of policy," which is not defined in the Act, is enshrouded in considerable smog, we hold that the policy statements complained of were properly held to be within the "general statements of policy" exception.[5]

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5 Appellants relied in their brief upon a decision by Judge Motley granting a motion for a preliminary injunction in *Felipe Demaren* v. *Attorney General*, 73 Civ. 1079 (S.D.N.Y. 1973). In that case, the plaintiff sought injunctive relief against denial of a stay of deportation pursuant to a policy similar to the one before us, and the court held that

In the first place, the regulation governing the issue of extensions of time to depart which is here relevant explicitly provides that the "[a]uthority to extend the time within which to depart . . . is within the sole jurisdiction of the district director." 8 C.F.R. § 244.2. The "instructions" complained of in this case do not purport to amend the published regulation or to oust the District Director of his "sole" discretion. In fact, the District Director of New York was the only INS officer who "routinely" extended the stay in the case of an alien married to a resident alien; the practice in the rest of the country was otherwise. We construe the instruction to be simply a statement by the agency of its general policy as a guideline for the District Directors. A distinctive characteristic of the general policy statement was indicated by Judge Friendly when he stated in his Holmes Lectures that "one of the values of the policy statement [is] the *education of agency members in the agency's work*." H. Friendly, The Federal Administrative Agencies 145-46 (1962) (emphasis added). One scholar has suggested that "[i]t may be that 'general statements of policy' are rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other rules are directed primarily at the public in an effort to impose obligations on them." Bonfield, Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the APA, 23 Admin. L. Rev. 101, 115 (1970-71). See also Parker, The

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the policy ought to have been published pursuant to 5 U.S.C. § 553(b). However, subsequent to the filing of briefs in the case before us, Judge Motley vacated the preliminary injunction in *Demaren*, denied a motion for a permanent injunction and dismissed the complaint, concluding on further consideration that there was no requirement that the policy at issue be published pursuant to section 553(b).

A.P.A.: A Study in Overestimation, 60 Yale L.J. 581, 598 (1951).[6]

The same thought is expressed in the so-called "substantial impact" test, which places within the rulemaking procedure only those rules which have "a substantial impact on those regulated," *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 744 (3d Cir. 1969), that is, ordinarily rules that change "existing rights and obligations," *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972).[7] We cannot conclude that the instructions at issue here changed the existing right of the appellants to have their applications for extensions of time to depart authorized in the sole discretion of the district director. As noted below, the appellants may still be entitled under the regulations to deferred voluntary departure on the basis of hardship.

The INS policy under attack here, considered according to the appropriate equal protection standard, does not violate the fifth amendment, and there was clearly no abuse of administrative discretion. Since the policy was a general statement of policy rather than a rule, there was no violation of the publication requirement of the APA. We conclude, therefore, that the decision below must be affirmed.

Affirmed.

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6 See *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 786 (S.D. Tex. 1960) (three-judge court), aff'd *per curiam*, 366 U.S. 419 (1961) (regulation governing internal management of an agency need not be published because it was not designed for the guidance of the public).

7 See also *Nader* v. *Butterfield*, 373 F. Supp. 1175, 1178 (D.D.C. 1974); *Continental Oil Co.* v. *Burns*, 317 F. Supp. 194, 197 (D. Del. 1970); *Pharmaceutical Mfgrs. Ass'n* v. *Finch*, 307 F. Supp. 858, 863 (D. Del. 1970); *National Motor Freight Traffic Ass'n* v. *United States*, 268 F. Supp. 90, 96 (D.D.C. 1967) (three-judge court), aff'd *per curiam*, 393 U.S. 18 (1968); *Seaboard World Airlines, Inc.* v. *Gronouski*, 230 F. Supp. 44, 46 (D.D.C. 1964).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RODOLPHE NOEL, FMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves and all Aliens in the United States similarly situated,	OPINION
Plaintiffs,	
-against-	73 Civ. 3682
JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,	#40347
Defendants.	

GAGLIARDI, D. J.

This is an action by Rodolphe Noel, Emiris Noel, Eddy Antoine Petit and Yanick Petit on behalf of themselves and other aliens similarly situated challenging the policy of the Immigration and Naturalization Service (hereinafter the Service) which denies to Western Hemisphere aliens married to permanent resident aliens and illegally in this country awaiting issuance of a visa the discretionary relief of an extended departure date, except upon a showing of compelling

factors. By motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure plaintiffs seek an order restraining the deportation of Rodolphe Noel and Eddy Antoine Petit and restraining the implementation of the policy pending the determination of this declaratory judgment action. The motion for preliminary relief is denied upon examination of the affidavits submitted by the parties. Dopp v. Franklin National Bank, 461 F.2d 873, 979 (2d Cir. 1972).

Rodolphe Noel, a native and citizen of Haiti, was admitted to this country as a non-immigrant visitor in May, 1969 on a two month temporary basis. Having remained longer than permitted, Noel was eventually apprehended by the Service on June 15, 1972, and deportation proceedings against him were commenced the following day. During the course of the proceedings, Noel applied for and was granted the discretionary relief of voluntary departure pursuant to which he was to depart by September 27, 1972, or, failing to do so, a deportation order to Haiti would become effective. A warrant of deportation was issued, effective August 21, 1973, when Noel failed to comply with the order. On August 20, 1973 Noel requested the District Director to extend the date for his voluntary departure on the basis of his marriage on April 19, 1973 to plaintiff, Mrs. Emiris Noel, a permanent resident alien of the United States until such time as a visa became available. The application was denied.

Plaintiff, Eddy Antoine Petit, a native and citizen of Haiti, is also presently subject to a warrant of deportation. Similarly admitted for two months as a non-immigrant visitor in August, 1970, Petit remained longer than permitted, and he was apprehended by the Service on June 7, 1973. At his deportation hearing, Petit also applied for and was granted the discretionary relief of voluntary departure. He was given thirty days in which to leave, or in the alternative, an order of deportation to Haiti would issue. Prior to the expiration of the thirty day period, Petit married plaintiff, Mrs. Yanick Petit on June 26, 1973. Proceeding on the same basis as plaintiff Noel, Petit made an application for suspension of voluntary departure until a visa became available. Petit's request was denied, and departure was set for July 27, 1973. Following his failure to depart, the Service issued a warrant of deportation effective September 5, 1973. Deportation of both Noel and Petit has been voluntarily stayed by the Service pending decision on this motion.

Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. §1254(e), provides that in the course of a deportation proceeding an alien may apply for the privilege of voluntary departure. The Regulations permit the Special Inquiry Officer in his discretion to specify the time within which the alien must depart. 8 C.F.R. §244.1 (1973). "Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director." 8 C.F.R. §244.2 (1973).

To mitigate the hardship an order of deportation has on a Western Hemisphere alien married to a permanent resident alien and illegally in this country, the District Director in New York followed a policy from 1968 through part of 1972 of granting an extension of voluntary departure to those deportable aliens pending issuance of a permanent visa.[1] However, hearings conducted by the Subcommittee on Immigration and Nationality of the House of Representatives Committee on the Judiciary in early 1972 revealed the adverse effect such a policy was having on the domestic labor market. Moreover, by 1972 the large number of persons from the Western Hemisphere seeking the limited number of available visas resulted in a substantial waiting list.[2] Based on this information and a recommendation of the Subcommittee's Chairman, Congressman Peter W. Rodino, Jr., the Service established guidelines with respect to extended voluntary departures effective August 1, 1972. Under the altered policy, an alien's status of marriage to a permanent resident alien is insufficient in itself to warrant deferred departure; stays are to be granted only in individual cases upon a showing of compelling factors. See Memorandum, Associate Commissioner, Operations to All District Directors, et al., July 17, 1972, p. 2.

In response to pending legislation introduced in Congress which will significantly change the status of Western Hemisphere aliens with respect to preference quotas[3] and adjustment of status,[4] and upon the recommendation

of Congressman Rodino, the Service announced on April 11, 1973 that Western Hemisphere alien spouses of permanent resident aliens could, as a matter of discretion, be granted an extended voluntary departure. Less than two weeks later, the Service confined the modification to those aliens who were in the country and married to a permanent resident alien as of April 10, 1973. Telegram dated April 20, 1973 from Acting Commissioner Greene. All other Western Hemisphere aliens who entered the country and married a permanent resident alien after that date are treated under the policy effective August 1, 1972. The Service maintained that this modification was adopted to delay "enforcement of departure of specified relatives who are already in the United States," but "not adopted as an invitation to aliens to thereafter enter this country." See Memorandum, Associate Commissioner, Operations to Regional Commissioner, San Pedro, California, May 16, 1973, p. 2.

Under Section 201(b) of the Immigration and Nationality Act, 8 U.S.C. §1151(b), aliens who are the children, spouses or parents of United States citizens are classified as "immediate relatives" and may be granted immigrant visas without regard to numerical limitations or the hemisphere of origin. Once so classified, such relatives may obtain a permanent visa within a matter of months. Consequently, an alien spouse of a United States citizen is generally accorded an extension of voluntary departure pending issuance of a permanent visa.

Plaintiffs contend that the August 1, 1972 policy and its April 10, 1973 modification constitute: (1) an arbitrary, capricious and gross abuse of administrative discretion; (2) a violation of the constitutional guarantee of equal protection of laws; (3) a violation of the publication requirement of the Administrative Procedure Act, 5 U.S.C. §553; and (4) a violation of the constitutional principle of separation of powers, see Kilburn v. Thompson, 103 U.S. 168, 190 (1881).

"[T]he two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied." Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc., 476 F.2d 687, 692 (2d Cir. 1973).

First, plaintiffs maintain that the differences in treatment between alien spouses of United States citizens and alien spouses of permanent resident aliens, and within the latter category, between aliens present in the country and married as of April 10, 1973 and those who arrive or marry after that date constitute a gross abuse of discretion and are unlawful. The Second Circuit has held that in the grant or refusal of voluntary departure, the Service and the administrator may establish groups of persons entitled to discretionary relif so long as the classifications are rationally related to the statutory scheme. Buckley v. Gibney, 332 F.Supp. 790 (S.D.N.Y.), aff'd per curiam, 449

F.2d 1305 (2d Cir. 1971), cert. denied, 405 U.S. 919 (1972); Fook Hong Mak v. Immigration and Naturalization Service, 435 F.2d 728 (2d Cir. 1970); Lam Tat Sin v. Esperdy, 334 F.2d 999 (2d Cir. 1964).

The treatment of married Western Hemisphere aliens for purposes of extended voluntary departure on the basis of classification of spouse is reasonable in view of the statutory scheme which places no immigrant visa quota on spouses of citizens, but imposes a numerical limitation on spouses of permanent resident aliens. In practical terms, the apparent difference in time required to obtain a permanent visa substantiates the differentiation. Furthermore, it is certainly within the Service's discretion to conclude that other considerations may at some time warrant lenient treatment, but that to grant it in all situations would encourage aliens to enter illegally, and acquire the status, and would open a loophole in disregard of the statute.

Plaintiffs second argument is that the two classifications in issue deny plaintiffs the constitutional guarantee of equal protection of the laws. In Borass v. The Village of Belle Terre, 476 F.2d 806 (2d Cir.) rehearing en banc denied, prob. juris. noted, 42 U.S.L.W. 3226 (U.S. October 15, 1973) (No. 191), the Second Circuit held that: "If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will

be upheld." 476 F.2d at 814. Distinctions drawn for the purpose of granting stays of deportation have consistently passed constitutional muster in this Circuit. Buckley v. Gibney, supra, 332 F.Supp. at 795; Application of Amoury, 307 F.Supp. 213 (S.D.N.Y. 1969)(Weinfeld, Jr.); see Faustino v. Immigration and Naturalization Service, 432 F.2d Cir.), cert. denied, 401 U.S. 921 (1971); Mitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir.), cert. denied, 302 U.S. 816 (1963); accord, Perdido v. Immigration and Naturalization Service, 420 F.2d 1179 (5th Cir. 1969). The classifications in this case are no less substantially related to the statutory scheme which treats relatives of citizens differently from relatives of permanent resident aliens than those classifications based on other statutory distinctions which distinguish between the nature of the work one performs, see Buckley v. Gibney, supra, or the citizenship of one's parents, see Application of Amoury, supra.

Third, plaintiffs contend that the August 1, 1972 policy and April 10, 1973 modification are invalid since the Service failed to publish the "rules" on thirty days' notice in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §553 (b), (d). Under the test set forth in Lewis-Mota v. Secretary of Labor, 469 F.2d 475 (2d Cir. 1972), whether given instructions are to be considered a "rule" under 5 U.S.C. §551(4) or within the exception for a "general statement of policy" under 5 U.S.C. §553(b), the Court must look to the "substantial impact

of the action" on the "existing rights and obligations of the parties." 469 F.2d at 482. In Lewis-Mota, aliens admitted to this country with labor certifications based on a precertified list of jobs in short supply found themselves no longer certified (after their temporary visas expired) following the Secretary of Labor's suspension of the precertified lists without notice. The court invalidated the rule based on the Service's failure to publish it on thirty days' notice. Neither at the time the instructions were altered on August 1, 1972, nor at the time the Service determined to grant the benefit to those aliens who were already in the cojntry and married to a permanent resident alien on April 10, 1973, were plaintiffs Noel and Petit married to permanent resident aliens. In fact, each may still be entitled under the Regulations to adeferred voluntary departure on the basis of hardship, in the discretion of the district director, as is any deportable alien whether married or not. 8 C.F.R. §§ 244.1 and 244.2 (1973).

Plaintiffs' final argument that the Service abdicated its statutory responsibility to the Chairman of the Subcommittee on Immigration and Nationality in violation of the constitutional principle of separation of powers fails wide of the mark. While it is conceded that the Chairman made certain recommendations to the Service based on information gathered during congressional hearings, correspondence from the Service indicated that to the extent followed, the changes in the

instructions were based on the information provided, and not upon an order from the House Subcommittee.[5]

Upon review of plaintiffs' arguments, the probability of ultimate success on the merits is not sufficiently likely to warrant the preliminary relief requested. Accordingly, the motion for a preliminary injunction is denied.

So Ordered.

_____

U.S.D.J.

Dated: New York, New York
February 6, 1974.

FOOTNOTES

1. The affidavits of the parties are unclear as to what periods of time a formal policy to grant deferred departure was effective prior to 1972. It is certain, however, that New York's District Director routinely granted lenient treatment. (Government's Exhibit N, Letter Regional Commissioner, Burlington, Vermont to District Director, New York, June 9, 1972). For purposes of this motion it is unnecessary to determine whether a policy of leniency was consistently followed by district directors prior to July 31, 1972, or whether inconsistent policies were followed by district directors in the exercise of their discretion.

2. Under the amendments to the Immigration and Nationality Act in 1965, Western Hemisphere aliens are treated separately for purposes of permanent visas from the rest of the world, and a numerical limitation is established to be filled on a first come, first served basis. Section 101(a)(27) and 201(a) of the Immigration and Nationality Act, 8 U.S.C. §§1101(a)(27) and 1151(a). For aliens from the Western Hemisphere as well as other aliens, who wish to immigrate for the purpose of entering the domestic labor market, the statute requires a labor certification from the Secretary of Labor to the effect that entry will not adversely affect the domestic labor market. Western Hemisphere aliens who are parents, spouses or children of United States citi-

zens or of permanent resident aliens are excepted from this requirement. Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14). Weather certified or excepted from certification, issuance of visas to Western Hemisphere aliens is subject to the numerical limitations in the statute.

3. Under proposed H.R. 981, the two separate quotas for Western Hemisphere aliens and "Worldwide" aliens would be replaced by one overall numerical ceiling. The visa preference presently applicable to only Worldwide aliens, which accords alien spouses of permanent resident aliens preference, will apply to Western Hemisphere aliens as well. Under the proposal, immediate relatives of permanent resident aliens will be given first preference status.

4. Under proposal H.R. 982, Section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255 which presently permits aliens under prescribed conditions to adjust to a permanent status while in this country will apply to Western Hemisphere aliens. The exclusion of Western Hemisphere aliens from this under the present law has given rise to the problems underlying the issues in this case.

5. Memorandum, Associate Commissioner, Operations to All District Directors, et al., July 17, 1972, p. 1.

Exhibit C to

Affidavit of Austin T. Fragomen, Jr.

(Retyped)

AMERICAN IMMIGRATION AND

CITIZENSHIP CONFERENCE

509 Madison Avenue * New York, N.Y. 10022

April 2, 1973

Special Bulletin No. 9

CONGRESSMAN RODINO ASKS FOR DELAY OF
ENFORCED DEPARTURE OF CERTAIN WESTERN HEMISPHERE ALIENS

As reported in AICC NEWS, Vol., XVIII, No. 4, the Immigration and Naturalization Service at the suggestion of the House Judiciary Subcommittee on Immigration and Nationality ceased its policy of granting automatic deferred departure status for aliens in the professional classes, and natives of the Western Hemisphere with close lawful resident alien relatives in the United States. Noting that Subcommittee No. 1 was in the process of considering new legislation regarding the Western Hemisphere immigration situation, Rep. Rodino, Chairman of the House Judiciary Committee, suggested to Commissioner of Immigration and Naturalization, Raymond F. Farrell in a letter of March 28, 1973 as follows:

Dear Mr. Commissioner:

I am sure you are aware that the Members of Subcommittee No. I of this Committee are commencing extensive hearings on legislation designed to establish a preference system for the Western Hemisphere.

My bill, H.R. 981, to amend the Immigration and Nationality Act in that respect is under active consideration by the Subcommittee. Knowing of their diligence and their awareness of the need for such legislation, it is my firm belief that legislation equalizing the two hemispheres will be favorably acted upon by the Committee during the current session of the Congress.

With that in mind, coupled with the fact that legislation permitting the adjustment of status of certain natives of the Western Hemisphere has already been ordered favorably reported to the House of Representatives, I believe that you should consider issuing instructions to your Field Offices to delay enforcing departure of natives of the Western Hemisphere who are immediate relatives as defined in section 201(b) of the Immigration and Nationality Act; the unmarried sons or daughters of United States citizens; and the spouse or unmarried son or daughter of an alien who has been lawfully admitted to the United States for permanent residence.

I feel certain that you will agree that this course of action will alleviate much hardship and that the interest of humanity will be better served. The uniting of families has been paramount in all consideration of legislation in the field of immigration.

Kindest regards.

Sincerely,

(signed) PETER W. RODINO, JR.
Chairman